ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EUI WORKING PAPERS

RSCAS 2019/83
Robert Schuman Centre for Advanced Studies
Global Governance Programme-372

Indonesia – Safeguard on Certain Iron or Steel Products: *If it looks like a duck, swims like a duck, and quacks like a duck, then it is not a duck*

Thomas J. Prusa and Edwin A. Vermulst

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

Indonesia – Safeguard on Certain Iron or Steel Products:
If it looks like a duck, swims like a duck, and quacks like a duck, then it is not a duck

Thomas J. Prusa and Edwin A. Vermulst

EUI Working Paper **RSCAS** 2019/83

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s).
If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Thomas J. Prusa and Edwin A. Vermulst, 2019

Printed in Italy, October 2019
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
www.eui.eu
cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

For more information: http://eui.eu/rscas

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

The Global Governance Programme

The Global Governance Programme is one of the flagship programmes of the Robert Schuman Centre. It is a community of outstanding professors and scholars, that produces high quality research and engages with the world of practice through policy dialogue. Established and early-career scholars work on issues of global governance within and beyond academia, focusing on four broad and interdisciplinary areas: Global Economics, Europe in the World, Cultural Pluralism and Global Citizenship.

The Programme also aims to contribute to the fostering of present and future generations of policy and decision makers through its executive training programme: the Academy of Global Governance, where theory and 'real world' experience meet and where leading academics, top-level officials, heads of international organisations and senior executives discuss on topical issues relating to global governance.

For more information: http://globalgovernanceprogramme.eui.eu

The European University Institute and the Robert Schuman Centre are not responsible for the opinions expressed by the author(s).

Abstract

In July 2014 Indonesia implemented a safeguard tariff on galvalume, a type of galvanized flat-rolled steel. Chinese Taipei and Viet Nam challenged the measure, mainly claiming that Indonesia's administering authority failed to satisfy various substantive and procedural requirements of the GATT 1994 and the Safeguards Agreement. The Panel and AB found that the tariff was not a safeguard measure but rather was a simple increase in Indonesia's applied rate. Interestingly, Viet Nam, the largest import supplier, is a member of a free trade area with Indonesia, meaning Viet Nam is not subject to the MFN rate. Viet Nam's preferential tariff treatment likely influenced Indonesia's decision to claim the action was a safeguard. Ironically, even though the Appellate Body essentially rejected its claims, the ruling benefits Viet Nam.

Keywords

global safeguard; bound tariff; galvalume

1. Introduction[*]

While *Indonesia — Iron or Steel Products*[1] has neither the procedural gravitas of *Argentina — Footwear (EC)*[2] nor the global trade implications of *US — Steel Safeguards*,[3] it nevertheless has potentially significant implications for how the Appellate Body (AB) will handle future safeguard disputes. As measured either by scope or by trade value, the dispute itself is minor. The dispute involved Indonesia's mid-2014 decision to impose safeguard duties on galvalume, a type of galvanized flat-rolled steel product. Two major import suppliers of galvalume, Chinese Taipei (DS490) and Viet Nam (DS496), challenged the measure, primarily asserting that the investigative authority's process fell short of what was delineated in *Argentina — Footwear (EC).* The Panel and AB's narrowly crafted decisions hinged on a tariff schedule technicality. All said, one could reasonably conclude that this is a modest dispute with modest implications.

Yet, we think there might be more to this dispute than meets the eye. What makes the dispute potentially consequential is that the Panel and AB concluded that the dispute did not involve what the parties thought it did – a case of mistaken identity so to speak. Indonesia, Chinese Taipei, and Viet Nam all agreed that the measure imposed was a safeguard measure within the meaning of Safeguards Agreement Article 1. The parties thought the crux of the dispute was whether Indonesia's investigative authority had followed all of the necessary procedural steps before levying the safeguard tariff. Interestingly, that is not how the Panel interpreted the dispute. In a bold affirmation of the WTO Dispute Settlement Body's independence, the Panel decided that all three parties were wrong: the tariff in question was not a safeguard measure.[4] The Panel determined (and the AB affirmed) that this was a simple discretionary increase in Indonesia's applied tariff. The reasoning was that because Indonesia did not have a binding tariff obligation with respect to galvalume, Indonesia had neither suspended a GATT obligation nor withdrawn or modified a GATT concession. As a result, Chinese Taipei's and Viet Nam's challenges were essentially moot.

Interestingly, Indonesia excluded 120 developing countries from the safeguard measure because it thought it needed to impose the higher duty on a discriminatory basis in order to comply with the special and differential (S&D) requirements of Safeguards Agreement Article 9.1. However, in light of the finding that the duty was not a safeguard measure, the Panel concluded (and the AB affirmed) that such exclusions were not only unnecessary but in fact were inconsistent with the most favoured nation (MFN) provisions in GATT Article I. Thus, Indonesia's discriminatory implementation was deemed inconsistent with GATT Article I.

While this dispute appears to be a simple case of a discretionary tariff increase masquerading as a safeguard measure, we believe there is more here than meets the eye. Resorting to the Safeguard Agreement offered economic value beyond what was available in Indonesia's tariff schedule. This is because Viet Nam, by far the largest source of imported galvalume, had a free trade agreement with Indonesia. Thanks in part to its preferential tariff rate (0%), Vietnamese suppliers dominated the Indonesian galvalume import market. If Indonesia had simply raised its MFN rate, suppliers from Viet Nam would be unaffected. In fact, a higher MFN tariff would arguably have resulted in an even greater

[*] The views expressed in this paper are those of the authors and all omissions and errors are also those of the authors. We would like to thank Gabrielle Marceau for helpful comments on the issues.

[1] *Indonesia — Safeguard on Certain Iron or Steel Products* (Chinese Taipei and Viet Nam), WT/DS490/AB/R and WT/DS496/AB/R, 15 August 2018.

[2] *Argentina — Safeguard Measures on Imports of Footwear* (WT/DS121/AB/R).

[3] *United States — Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R) involved EC, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil.

[4] Raina (2019) offers a cogent discussion of the meaning of and jurisprudence defining a safeguard measure.

competitive advantage for Viet Nam. A safeguard measure, on the other hand, applied to all of Indonesia's trade partners (including those with trade agreements), a fact that makes Indonesia's recourse to safeguard protection particularly expedient.

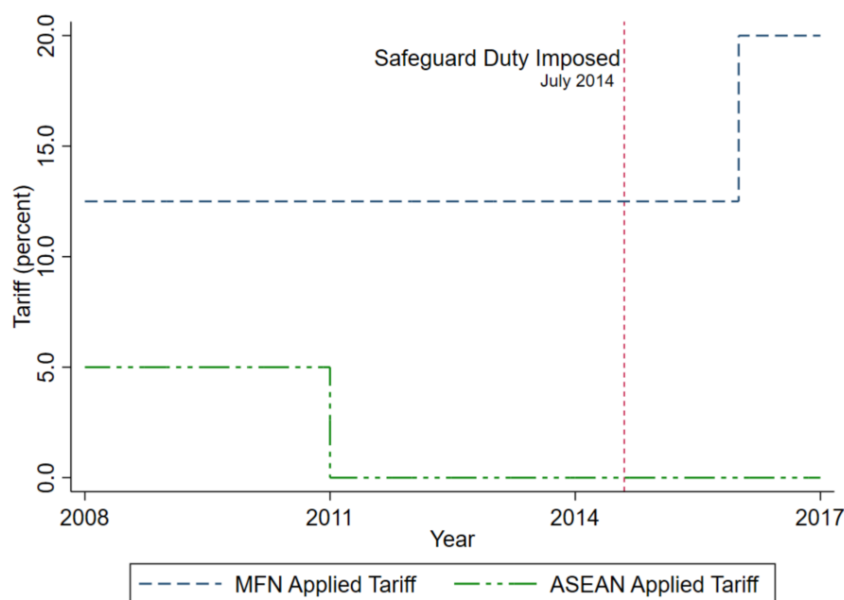
Indonesia is hardly the first or only country to publicly justify its claim for protection under some WTO provision when in fact ample evidence suggests that simple protectionism is the real reason. As of the time of our writing of this paper (mid-2019) a slew of disputes involving questionable justifications for increased protection (most notably *US — Steel and Aluminum Products*[5]) are on the WTO Dispute Settlement Body's (DSB's) docket. The assertive stance taken by the Panel and AB in this dispute gives us reason to believe that the DSB will not feel constrained by the various parties' claimed justifications. This dispute, when combined with the recent Panel report in *Russia — Traffic in Transit (Ukraine)*,[6] suggests that WTO Panels and the AB will pro-actively and independently examine the WTO-consistency of trade restrictive measures, including their claimed legal basis.

2. Background

Indonesia is a member of the ASEAN Free Trade Area (AFTA) and related ASEAN free trade arrangements. Consequently, Indonesia has committed to moving to free trade with ASEAN members (Brunei, Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam) and also with countries such as Australia, New Zealand, China, India, and Korea.

A MFN ad valorem tariff of 12.5% was applied on imports of galvanized flat rolled steel (with the trade name of galvalume) during the period preceding the safeguard investigation (**Figure 1**). Thanks to preferential trade agreements (PTAs) the tariff rate on galvalume was 0% for Viet Nam (since 2011) and 10% for Korea. The other two large suppliers, Chinese Taipei and China, both were subject to the MFN rate.

Figure 1. Indonesia MFN and ASEAN PTA Applied Tariffs (galvalume)



5 *United States — Certain Measures on Steel and Aluminum Products* (WT/DS547, 550, 548, 551, 552, 554, 556, 564) involves India, Canada, European Union, Mexico, Norway, Russia, Switzerland, and Turkey.

6 *Russia — Measures Concerning Traffic in Transit* (WT/DS512, 29 April 2019).

During the period preceding the safeguard investigation Indonesian imports of galvalume increased sharply. As seen in **Table 1** between 2009 and 2013 (the last year before the duties were levied) galvalume imports from all sources increased 380%, from $59.7 million to $287 million. Of the $227 million increase in imports, nearly 90% was due to Viet Nam ($173.4 million) and Chinese Taipei ($28.5 million). The fall in Viet Nam's preferential rate in 2011 further increased Viet Nam's dominant position: Viet Nam's trade value increased by more than $100 million and its market share grew by more than 30 percentage points over the subsequent three years. As seen, Viet Nam and Chinese Taipei were the dominant import suppliers. For perspective, Chinese Taipei, the number two supplier, was more than twice as large as the next largest supplier, Korea.

Table 1. Indonesian Galvalume Imports (US$ millions)

	Chinese Taipei	Viet Nam	Total
2009	$23.0	$19.1	$59.7
2010	$44.2	$40.7	$118.3
2011	$42.6	$91.3	$166.2
2012	$49.8	$140.4	$237.0
2013	$51.4	$192.4	$287.0
2014	$11.7	$164.5	$191.2
2015	$0.0	$16.5	$65.7
2016	$0.0	$12.9	$76.9
2017	$0.0	$14.0	$43.1
Change in Trade			
2009-13	$28.5	$173.4	$227.3
2011-13	$8.8	$101.1	$120.8
2013-17	-$51.4	-$178.5	-$243.8

In 2014 the Indonesian administering authority KPPI (Komite Pengamanan Perdagangan Indonesia) initiated and conducted a global safeguard investigation under its domestic safeguards legislation. This investigation led to the imposition of a specific duty for a period of three years, *i.e.*, from 22 July 2014 to 21 July 2017. The schedule of duties is given in **Table 2**. For convenience, we have converted the specific duty in each year to an approximate ad valorem equivalent. As seen, we estimate the specific duty in the first year was equivalent to a 50% ad valorem tariff, declining to 43% in year two and then to 36% in year three.

Table 2. Indonesia Safeguard Tariff on Galvalume[7]

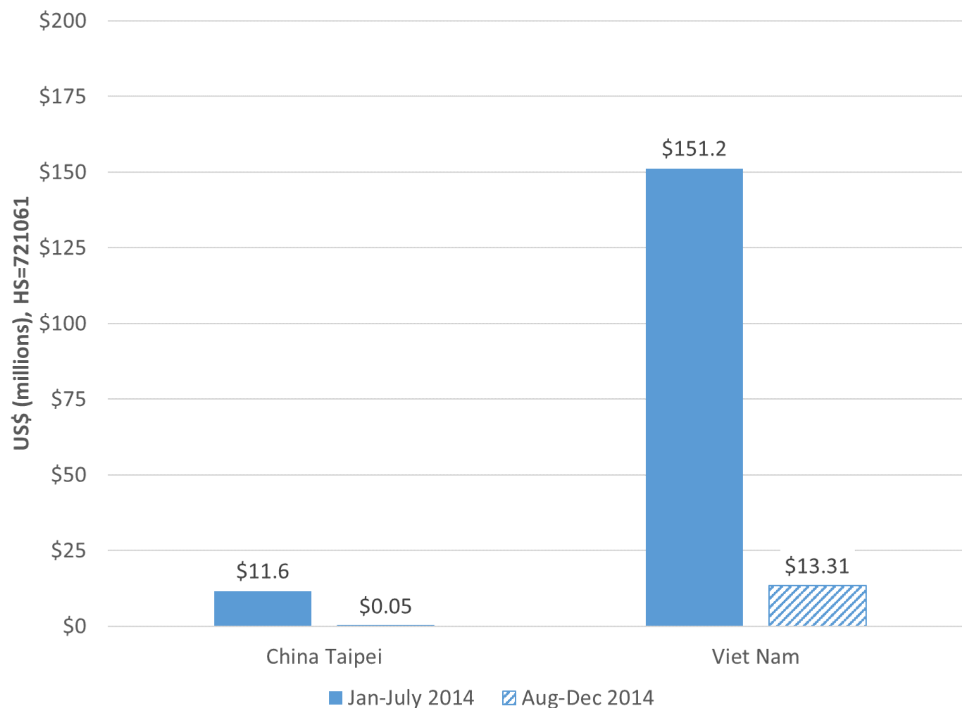
	Specific tariff per Metric ton (Indonesian Rupiah)	Equivalent Ad Valorem Tariff Rate
Year 1	4,998,784	50%
Year 2	4,314,161	43%
Year 3	3,629,538	36%

[7] Conversion from specific tariff to ad valorem was done as follows. First, the average imported price of galvanized steel paid by Indonesia during the period of review (US$850/metric ton) was computed from https://comtrade.un.org. Second, because imports are quoted in US$, the Indonesian specific tariff rate in each year was converted to the equivalent US$ specific tariff using the average Indonesian rupiah to US$ exchange rate for 2014, which is 11,854.21 (https://www.x-rates.com). Third, the ad valorem tariff rate is calculated by dividing the implied US$ specific tariff for each year by the average imported price.

The specific duty was applied to imports of galvalume from all sources, with the exception of 120 allegedly developing countries[8] that were listed in Indonesia's Article 9.1 Agreement on Safeguards (ASG) safeguard notification to the WTO Safeguards Committee.[9]

As seen in **Table 1** the safeguard measure had its intended effect – trade plummeted. As compared to the year before, galvalume trade in 2017 was just 15% of its pre-safeguard level. Within the first year after the measure, overall imports of galvalume fell by nearly 80%. The impact on the two complaints was even larger. In the second half of 2014 imports from Chinese Taipei fell by more than 99% and those from Viet Nam fell by more than 90% (**Figure 2**). The two complainants accounted for the vast majority of the trade loss due to the specific tariff: $230 million of the $243 million in lost trade is attributable to Chinese Tapei and Viet Nam.

Figure 2. 2014 Value of Indonesian Galvalume Imports, Complainants (US$, millions)



3. Panel findings

While the safeguard duty had entered into force on 22 July 2014 it took Chinese Taipei and Viet Nam until 20 August and 15 September 2015, respectively, to file their requests for establishment of a Panel. Consequently, the Panel report was not circulated until after the initial three year safeguard period had expired.[10] The AB largely upheld the Panel's findings. On 15 August 2018 the WTO AB issued its report. On 22 March 2019 Indonesia withdrew the safeguard measure to comply with the AB findings.

Chinese Taipei and Viet Nam argued that the specific duty was a safeguard measure within the meaning of Article 1 ASG which Indonesia had adopted and applied in violation of various WTO provisions, notably Articles I:1, XIX:1(a) and XIX:2 of the GATT 1994 and Articles 2.1, 3.1, 4.1(b), 4.2(a), 4.2(b), 4.2(c), 12.2 and 12.3 of the ASG.

[8] See Annex 1.

[9] Panel report, para. 2.2.

[10] However, the safeguard measure was extended in September 2017 for a two-year period.

Thus, Chinese Taipei and Viet Nam considered that Indonesia in the course of its safeguard investigation had violated both procedural and substantive provisions.

In terms of substantive violations, in their view Indonesia had failed to demonstrate the existence of unforeseen developments, the effect of the [GATT] obligations and the 'logical connection' between these two elements and the increase in imports that allegedly caused serious injury, Indonesia's increased imports' determination was not based on an increase in imports that is "recent enough", its threat of serious injury finding was inconsistent with the definition of threat of serious injury within the meaning of Article 4.1(b) ASG, it had not conducted a proper causation and non-attribution analysis and it had not observed the 'parallelism' requirement.

In terms of procedural violations, Indonesia allegedly had failed to provide a reasoned and adequate explanation of how the facts supported its determination of threat of serious injury, including the evaluation of all relevant serious injury indicators, to provide all pertinent information in its notifications to the WTO Committee on Safeguards of the finding of threat of serious injury and the proposal to impose a safeguard measure, and to provide a reasonable opportunity to hold consultations prior to imposing the measure.

However, if the Panel were to find that the specific duty was not a safeguard duty within the meaning of Article 1 of the ASG, Chinese Taipei and Viet Nam requested the Panel to find that the measure violated Article I:1 of the GATT 1994 in that it discriminated between sources of imports of galvalume.[11]

In a relatively short report of 40 pages the Panel found that the specific duty did not constitute a safeguard measure within the meaning of Article 1 of the ASG and that the application of the duty on imports of galvalume originating in all but the 120 allegedly developing countries was inconsistent with Indonesia's MFN obligation under Article I:1 of the GATT 1994.[12] The Panel therefore did not find it necessary to address the many claims which assumed that the specific duty qualified as a safeguard measure. Given that the Panel did not address these claims, we will not do so either. However, it would seem that the investigation fell well short of what is required.

4. Appellate Body findings

Although all three parties appealed the Panel finding that the Indonesian measure was not a safeguard measure,[13] the AB upheld the finding, although it had misgivings about part of the analysis, as we will see below.

As regards Indonesia's claim that the Panel exceeded its terms of reference within the meaning of Articles 6.2 and 7.1 of the DSU or failed to carry out an objective assessment of the matter under Article 11 of the DSU by finding that the measure did not constitute a safeguard measure, the AB found that under Article 11 DSU a panel is in fact obliged to examine whether the provisions of the WTO agreements invoked by a complaint as the basis for its claims are applicable and relevant to the case.[14] As Article 1 ASG applies to measures provided for in Article XIX of the GATT 1994, it was the Panel's duty to assess whether the specific duty constitutes a safeguard measure in order to determine whether Article XIX of the GATT 1994 and the invoked provisions of the ASG applied.[15]

---

[11] Panel report, para. 3.1.

[12] Panel report, para. 8.1.

[13] AB report, para. 5.15.

[14] AB report, paras 5.31, 5.33.

[15] AB report, para. 5.33.

The AB subsequently found that the Panel did not err in its interpretation and application of Article 1 of the ASG and Article XIX of the GATT 1994, again ruling against all three appellants.

Article XIX:1(a) of the GATT 1994 provides that:

> If, as a result of unforeseen developments and of the effects of the obligations incurred by a Member under this agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The AB considered that a "plain reading" of this article indicates that a safeguard measure is a measure to suspend a GATT obligation or withdraw or modify a tariff concession. Therefore, the AB "failed to see" how a measure could be characterized as a safeguard measure in the absence of such a *suspension, withdrawal or modification*.[16] Furthermore, in the view of the AB, the suspension, withdrawal or modification has to be designed *to prevent or remedy serious injury*.[17] These two elements must be present for a measure to constitute a safeguard measure and must be distinguished from the conditions that must be satisfied in order for a safeguard measure to be WTO-consistent.[18] In order to determine whether a measure contains these elements, a Panel must "assess the design, structure and expected operation of the measure as a whole". Relevant factors for this assessment include the characterization of the measure under the domestic law of the Member, the domestic procedure that led to its adoption, and any relevant notifications to the WTO Safeguards Committee, but none of these is dispositive (as in fact this case showed).[19] On the other hand, the AB acknowledged that Article XIX:1(a) is open-ended as regards the type of GATT obligations that may be suspended. Obvious candidates are Article II:1 (tariff bindings) and XI:1 (quotas) of the GATT 1994, but there might be others as well.[20]

The AB agreed with the three appellants (and several third parties) that the Panel had conflated the constituent features of a safeguard measure with its conditions for conformity with the ASG.[21]

Next, the AB recalled that the Panel had found that the specific duty (1) did not suspend, modify or withdraw Indonesia's Article II obligations as Indonesia had not bound its tariff for galvalume; (2) did not suspend Indonesia's obligations under Article XXIV GATT 1994 as the preferential treatment Indonesia had granted to its regional trade agreement partners concerned Indonesia's obligations under those agreements and (3) did not suspend Indonesia's Article I:1 GATT 1994 MFN obligation because of Indonesia's exemption of the 120 countries *ex* Article 9.1 of the ASG.[22] As only the third issue had been appealed, the AB limited its analysis to this. The AB considered that "by its own terms" the exemption could be seen as suspending Indonesia's Article I:1 MFN treatment obligation. However, such exemption was obviously not designed to prevent or remedy serious injury.[23]

---

16 AB report, para. 5.55.

17 AB report, para 5.56.

18 AB report, para. 5.57. "To the extent and for such time as may be necessary" (the necessity requirements) are such conditions, see AB report, para. 5.59.

19 AB report, paras 5.60, 5.64. Compare the Panel report in *India — Certain measures on imports of iron and steel products*, WT/DS518/R, 6 November 2018, para. 7.40.

20 AB report, para. 5.58.

21 AB report paras 5.61-5.62. The Panel had included "to the extent and for such a time as may be necessary" as constituent elements.

22 AB report, para. 5.63.

23 The AB noted that neither the Regulation imposing the duty nor the Final Disclosure Report indicated such a design and that furthermore Indonesia had confirmed before the Panel that the exemption was "neither intended nor designed" for that purpose, see AB report, para 5.66.

Before the AB, Indonesia argued that the purpose of the discriminatory application of the duty was to apply the duty only to major exporting countries which had contributed the most to the serious injury. However, the AB considered this an *ex post* justification.[24] Furthermore, Indonesia had confirmed during the Panel proceeding that the exemption was aimed at complying with Article 9.1 of the ASG (exclusion of developing countries with a *de minimis* import share). The AB considered that compliance with Article 9.1 concerned the WTO-consistent application of safeguard measures and was not relevant for the assessment whether the measure constituted a safeguard measure in the first place. And indeed, rather than preventing or remedying serious injury, the developing country exemption in fact allowed more galvalume imports than would have been the case otherwise.

The AB therefore upheld the Panel's conclusion that the specific duty did not constitute a safeguard measure within the meaning of Article 1 of the ASG and did not rule on the various alleged violations of Article XIX and the ASG.

This left the AB to assess the Panel finding that the application of the duty on imports of galvalume originating in all but the 120 allegedly developing countries was inconsistent with Indonesia's MFN obligation under Article I:1 of the GATT 1994. On appeal Indonesia argued that the Panel had wrongly considered that Chinese Taipei and Viet Nam had made a claim that the duty "as a stand-alone" measure violated Article I:1 and had therefore exceeded its terms of reference. The AB held that both complainants had identified the measure at issue as the specific duty on galvalume and that their panel requests had "clearly" set out a claim under Article I:1 of the 1994.[25] The AB therefore concluded that the Panel did not err in concluding that the complainants had properly made a claim under Article I:1 against the specific duty as a stand-alone measure.

5. Commentary

The AB (and Panel) reports are noteworthy in that they confirm in the safeguards' context that a Panel is not precluded from determining the applicability of a WTO agreement in cases where the issue has not been raised by the parties and that in fact a Panel's duty to conduct an objective assessment of the matter *ex* Article 11 DSU may *require* a Panel to depart from positions taken by the parties.[26] In the present case, the litigants all had proceeded on the assumption that the specific duty was in fact a safeguard measure, but nevertheless the Panel, later supported by the AB, held that it could depart from this characterization and did so by holding that the duty was not a safeguard measure because it did not suspend a GATT obligation or withdraw or modify a tariff concession. The facts that Indonesia had conducted an administrative investigation under its safeguards' legislation, that the measure was characterized as a safeguard measure under Indonesian domestic law, and that it had made all relevant notifications to the WTO Safeguards Committee, all factors considered relevant (although not dispositive) by the AB, did not detract from this conclusion.

The AB ruling is welcome because it ends the confusion that had arisen as a result of a previous – unappealed – panel report involving a safeguard measure taken by the Dominican Republic (DR).[27] In that case, Costa Rica, Guatemala, Honduras, and El Salvador had challenged a safeguard measure imposed by the DR on polypropylene bags and tubular fabric. The facts of that case were relatively similar to the Indonesian case discussed here. The DR had also conducted a safeguard investigation and

---

[24] AB report paras 5.67, 5.68.

[25] AB report, paras 5.86-5.90.

[26] This ruling is potentially relevant for the WTO challenge launched by several WTO members against the US section 232 duties on steel and aluminum because it means that a Panel may examine whether these duties are in fact safeguard measures, as other WTO members have claimed.

[27] Panel Report *Dominican Republic — Safeguard measures on Imports of Polypropylene Bags and Tubular Fabrics*, WT/DS415, 416, 417, 418/R, 31 January 2012. Bown and Wu (2014) provide a detailed analysis of the Panel report.

imposed a safeguard measure under its domestic law, had excluded (some)[28] developing countries with *de minimis* market shares and submitted the various notifications to the WTO Safeguards Committee. Furthermore the DR had imposed a safeguard measure in the form of a duty increase, albeit an *ad valorem* one of up to 38%, and although the DR had bound its tariff within the meaning of Article II GATT 1994, the binding was at 40% and therefore the total duty remained below the tariff binding. Finally, the dispute was brought by PTA partners of the DR, as was the case with Viet Nam in our dispute.[29]

The difference with the Indonesian case was that before the Panel, the DR had taken the position that the measure in fact was not a safeguard measure because it remained below the level of the bound duty. In other words, the DR claimed that it had not suspended a GATT obligation or withdrawn or modified a tariff concession and therefore it was not bound by the disciplines of Article XIX GATT 1994 or the ASG.

The Panel ruled that the measure *did* qualify as a safeguard measure because it suspended the GATT 1994 Article I:1 MFN obligation by excluding Colombia, Indonesia, Mexico and Panama from the scope of the measure.[30] The Panel further ruled that the measure also violated Article II:1(b) second sentence of the GATT 1994, having found that the measure fell within the category "other duties or charges" within the meaning of that sentence[31] and which had not been recorded in the DR's schedule of concessions.[32] It therefore considered that the measure was a safeguard measure subject to the disciplines of Article XIX GATT 1994 and the ASG.

The AB report in the present case clearly sets out that the exclusion of developing countries *ex* Article 9.1 ASG does not result in the suspension of Article I:1 GATT 1994, confirming the findings of the Panel which had, in fact, openly rejected the findings of the DR Panel:

> We recognize that our views in this respect depart from certain statements and findings of the panel in *Dominican Republic — Safeguard Measures*. In that dispute, the panel found that the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards resulted in the suspension of the importing Member's MFN obligations under Article I:1 of the GATT 1994…We have carefully considered the panel's findings and, to the extent those findings would suggest a different outcome in this case, we respectfully disagree. In our view…the discriminatory application of a safeguard measure for the purpose of affording S&D pursuant to Article 9.1 *does not* result in a suspension of a Member's obligations under Article I:1, within the meaning of Article XIX:1(a) of the GATT 1994.[33] [Footnotes in original omitted]

In a footnote,[34] the Panel had noted that the facts in the DR case were different, among others because the measures in that case were found to suspend the obligations of the Dominican Republic under not only Article I:1 of the GATT 1994, but also Article II:1(b) of the GATT 1994.

The AB's clarification of the distinction between constituent elements of a safeguard measure (suspension of a GATT obligation or withdrawal or modification of a tariff concession designed to prevent or remedy serious injury) and Article XIX GATT 1994 conditions that must be satisfied for a

---

[28] The Dominican Republic had excluded Colombia, Indonesia, Mexico and Panama, but not Thailand, even though all five had comparable import shares, a point on which the Panel faulted the DR in its examination of the WTO compatibility of the 'safeguard' measure.

[29] Supposedly the DR used a safeguard measure for the same reason as Indonesia did in the galvalume case: to enable it to cover imports from its PTA partners within the scope of the measure which it could not have done if it had simply raised its MFN tariff (Bown and Wu, 2014).

[30] Panel report, paras. 7.67-7.73.

[31] Rather than as "ordinary customs duties" within the meaning of Article II:1(b) first sentence, as the DR had argued.

[32] Panel report, paras. 7.81-7.89.

[33] Panel report, para. 7.30.

[34] Panel report, footnote 61. See also AB report, footnote 191.

safeguard measure to be WTO-consistent (such as the necessity requirements in this case) and the approach of both the Panel and the AB to first address the legal qualification of a measure seems correct from a legal perspective and makes sense from a process economy perspective.[35] Similarly, it seems correct that while the developing country exemption under article 9.1 ASG may amount to a suspension of the Article I:1 MFN obligation of the GATT 1994, it is not designed to prevent or remedy serious injury.[36]

However, the AB findings also lays bare some painful shortcomings that result from a finding that imposition of an (unbound) duty is not a safeguard measure, even though it was treated as such by the importing country Member. Thus, as Chinese Taipei rightly pointed out,[37] if Indonesia were to have adopted a safeguard measure in the form of a – more trade-distorting – quota, it supposedly *would* have met the test as such a quota would then have suspended the Article XI GATT 1994 quota prohibition.

Furthermore, Indonesia is supposedly free to maintain or re-institute the specific duty as a simple increase of the unbound galvalume duty. This will benefit the major supplier Viet Nam as it would then return to its ASEAN free trade status[38] but disadvantage Chinese Taipei and developing countries.[39]

Assuming that Indonesia decided to follow the safeguard route because it wanted to hit the main galvalume exporter Viet Nam, one may wonder why it did not impose a safeguard measure under Article 23 of the the AFTA.[40] The reasons for this seem threefold. First, and probably most importantly, imposition of an AFTA safeguard measure obliges the AFTA member doing so to offer compensation to its main AFTA suppliers or face retaliation. Second, any such measure would apply to all AFTA members equally but would not extend to non-AFTA members and finally, it could result at most in imposition of the MFN duty (which might not have been sufficient to deter Vietnamese exports to Indonesia).

6. Concluding Comments

An obvious question that arises in this case is why Indonesia made life so difficult for itself by imposing a specific duty following a safeguard investigation while it simply could have increased the unbound duty to any level it considered appropriate. Was it ignorance,[41] a desire to grant interested parties due process rights through pre-established domestic safeguard procedures or something else?

Our review of trade statistics indicates an increase in the (unbound) MFN duty would probably have enabled Viet Nam to capture an even higher market share. The safeguard duty on the other hand applied *erga omnes* (with the exception of the 120 developing countries) *in addition to* any MFN/preferential tariffs and therefore also covered Viet Nam. Indeed, the import statistics show that following the imposition of the specific duty Viet Nam's exports dropped dramatically and Chinese Taipei exports basically disappeared while imports from other sources relatively increased (albeit at much lower levels

[35] A finding that a claimed safeguard measure is not in fact a safeguard measure obviates the need to address claims regarding the consistency of the measure with Article XIX GATT 1994 and relevant ASG provisions.

[36] Compare Panel report, India – Certain measures on imports of iron or steel products, WT/DS518/R, 6 November 2018, paras. 7.61, 7.63.

[37] AB report, para. 5.36.

[38] This is not to say that Indonesia might not file an anti-dumping case against the Vietnamese galvalume exporter(s).

[39] It would also work to the disadvantage of the 120 developing countries that had previously been excluded from the scope of the specific duty on the basis of Article 9.1 of the ASG. However, trade statistics indicate that Indonesia did not import galvalume from any of the 120 exempted countries.

[40] https://www.asean.org/wp-content/uploads/images/2013/economic/afta/atiga%20interactive%20rev4.pdf, consulted on 20 July 2019.

[41] Or perhaps it reflects misplaced reliance on the Panel Report *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabrics*, WT/DS415, 416, 417, 418/R, 31 January 2012.

than pre-safeguard measure). Thus, to the extent the objective of Indonesia was to limit imports from the main exporting countries, it succeeded by imposing the specific duty as a safeguard measure.

Indonesia's actions in this case highlight important political economy and trade negotiating complications associated with preferential trade arrangements. As emphasized by Bagwell and Staiger (1999, 2002) trade agreements require all parties to evaluate the trade effects from changes to tariffs and rules. Negotiating agreements that balance the costs and benefits for each member is a precarious task. Countries like Viet Nam presumably offered concessions to Indonesia in order to obtain tariff concessions on products such as galvalume. When Indonesia uses the safeguard agreement to "undo" the trade effects from such concessions, it creates pressure Viet Nam and other ASEAN members to act similarly. As it turns out, galvalume is not the only example of Indonesia using trade instruments to reverse previously negotiated concessions. According to Girsang (2017), Indonesia is the ASEAN member with the most anti-dumping and safeguard actions. While not prohibited, these type of actions erode the value of the AFTA agreements to the other parties and should make it more difficult for the ASEAN group to negotiate additional agreements.

Finally, it seems to us that while the AB rightly distinguishes between the constituent elements of a safeguard measure and the conditions for its imposition, the unintended consequence of this ruling may be that WTO members wishing to impose safeguard measures in the future may decide to do so in the form of quotas rather than in the form of -- less trade-restrictive – duties in order to avoid any exposure to findings that the safeguard measures did not suspend a GATT obligation or withdraw or modify a tariff concession and therefore did not qualify as a safeguard measure in the first place.

References

Bagwell, Kyle, and Staiger, Robert W., "An Economic Theory of GATT." *American Economic Review*, 89 (1): 215-248 (1999).

Bagwell, Kyle and Staiger, Robert W., *The Economics of the World Trading System*, The MIT Press, Cambridge, MA (2002).

Bown, Chad P. and Wu, Mark, "Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic – Safeguard Measures", *World Trade Review*, 13:2, 179-227 (2014).

Girsang, Aritta, *Trade Remedy: A Stumbling Block for ASEAN Economic Integration?*, PhD Thesis, The University of Adelaide, (August 2017).

Raina, Akhil, "What Is a Safeguard Measure Under WTO Law?", *Trade Law & Development* 10:2, 463-81 (2019).

Annex 1

List of countries excluded from the safeguard measure

Albania	Madagascar
Angola	Malawi
Antigua, and Barbuda	Malaysia
Argentina	Maldives
Armenia	Mali
Bahrain, Kingdom of	Mauritania
Bangladesh	Mauritius
Barbados	Mexico
Belize	Moldova, Republic of
Benin	Mongolia
Bolivia	Montenegro
Botswana	Morocco
Brazil	Mozambique
Brunei Darussalam	Myanmar
Bulgaria	Namibia
Burkina Faso	Nepal
Burundi	Nicaragua -
Cabo Verde	Niger
Cambodia	Nigeria
Cameroon	Oman
Central African Republic	Pakistan
Chad	Panama
Chile	Papua New Guinea
China	Paraguay
Colombia	Peru
Congo	Philippines
Costa Rica	Poland
Cote d' Ivoire	Qatar
Croatia	Romania
Cuba	Russian Federation
Democratic Republic of the Congo	Rwanda
Djibouti	Saint Kitts and Nevis
Dominica	Saint Lucia
Dominican Republic	Saint Vincent and the Grenadines
Ecuador	Samoa
Egypt	Saudi Arabia, Kingdom of
El Salvador	Senegal
Fiji	Sierra Leone
Gabon	Solomon Islands
The Gambia	South Africa
Georgia	Sri Lanka

Ghana	Suriname
Grenada	Swaziland
Guatemala	Tajikistan
Guinea	Tanzania
Guinea-Bissau	Thailand
Guyana	The Former Yugoslav Republic of Macedonia
Haiti	Togo
Honduras	Tonga
Hungary	United Arab Emirates
India	Uruguay
Jamaica	Trinidad and Tobago
Jordan	Tunisia
Kenya	Turkey
Kuwait	Uganda
Kyrgyz Republic	Ukraine
Lao People's Democratic Republic	Vanuatu
Lesotho	Venezuela
Lithuania	Zambia
Macao, China	Zimbabwe

Author contacts:

Thomas J. Prusa

Department of Economics

New Jersey Hall, 75 Hamilton Street

Rutgers University, New Brunswick, NJ

Web: http://econweb.rutgers.edu/prusa/

Email: prusa@econ.rutgers.edu

Edwin A. Vermulst

VVGB Advocaten

13 Place des Barricades

1000 Brussels,

Belgium

Web: http://www.vvgb-law.com

Email: eve@vvgb-law.com